

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GEORGE TAPIA, an individual,

Plaintiff,

v.

CALIFORNIA RECONVEYANCE
COMPANY, MERSCORP, INC., a Virginia
Corporation, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
subsidiary of MERSCORP, INC., a Delaware
corporation, DOES individuals 1 to 100,
inclusive, and ROES corporations 1 to 30,
inclusive,

Defendants.

2:12-cv-105-RCJ-VCF

ORDER

Currently before the Court is Plaintiff's motion for a temporary restraining order and preliminary injunction (#1-4). For the following reasons, Plaintiff's motion for a temporary restraining order and preliminary injunction is denied.

BACKGROUND¹

Plaintiff George Tapia and his wife Donna Tapia, as husband and wife, purchased real

¹ Defendants have requested judicial notice to be taken of attached copies of relevant publicly recorded documents. (See Opp'n to Mot. for TRO (#6) at 5 n.1). The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 property located at 10421 Pacific Sageview Lane, Las Vegas, Nevada (the "Property") on or
2 about May 19, 2004.² (Deed (#6-3)). To finance the purchase of the Property, Plaintiff and
3 Donna Tapia obtained a loan from American Fidelity Mortgage Bankers, Inc., in the amount
4 of \$185,600, which was secured by a deed of trust (the "Deed of Trust"). (Deed of Trust (#6-
5 4)). The Deed of Trust names American Fidelity Mortgage Bankers as lender, Old Republic
6 Title as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee and
7 beneficiary. (*Id.* at 1).

8 On January 6, 2005, the Property was conveyed by Plaintiff and Donna Tapia to
9 "George Tapia and Donna Tapia, Trustees of the Tapia Family Trust." (Trust Transfer Deed
10 (#6-5)). Donna Tapia, as Trustee of the Tapia Family Trust, then conveyed the Property back
11 to Plaintiff on October 17, 2008 for no consideration. (Quitclaim Deed (#6-6)).

12 Plaintiff defaulted on the loan secured by the Deed of Trust by failing to make the
13 payment due on July 1, 2008. (Notice of Default (#6-9)). Plaintiff apparently attempted to
14 modify the loan, but was unsuccessful. (Compl. (#1-2) at 2; Mot. for TRO (#1-4) at 4). On
15 October 28, 2008, MERS, as nominee, substituted Cal-Western Reconveyance Corporation
16 ("Cal-Western") as trustee of the Deed of Trust. (Substitution of Trustee (#6-7)). MERS also
17 assigned all beneficial interest under the Deed of Trust to U.S. Bank, N.A., on October 28,
18 2008. (Assignment of Deed of Trust (#6-8)).

19 Cal-Western, as trustee, executed a notice of default on October 30, 2008, which was
20 recorded on November 3, 2008. (Notice of Default (#6-9)). As the default under the note

21
22 ² Plaintiff alleges that the Property was purchased and the Deed of Trust was executed
23 on October 17, 2008. (Compl. (#1-2) at 5). Although Plaintiff was listed as the sole owner of
24 the Property on a quitclaim deed executed on October 17, 2008, prior to that date he owned
25 the Property as trustee of the Tapia Family Trust and prior to that as a joint tenant with Donna
26 Tapia. (Deed (#6-3); Trust Transfer Deed (#6-5); Quitclaim Deed (#6-6)). The Deed of Trust
27 indicates it was executed on May 11, 2004 and there is no apparent factual basis for Plaintiff's
28 assertion that it was executed in 2008. (Deed (#6-3); Deed of Trust (#6-4)).

1 secured by the Deed of Trust was not cured, Cal-Western recorded a notice of trustee's sale
2 on February, 9, 2009; February 15, 2011; and October 17, 2011. (Notice of Trustee's Sale
3 (##6-10, -11, -12)).

4 Plaintiff—proceeding pro se—filed a complaint in the district court for the State of
5 Nevada in Clark County on December 28, 2011 against California Reconveyance Company,³
6 MERSCORP, Inc., and MERS (collectively “Defendants”). (Compl. (#1-2)). Plaintiff alleges
7 eight causes of action in his complaint, including: (1) injunctive/declaratory relief; (2)
8 negligence; (3) wrongful foreclosure; (4) breach of the covenant of good faith and fair dealing;
9 (5) statutorily defective foreclosure; (6) misrepresentation; (7) detrimental reliance; and (8)
10 violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692). (*Id.* at 7-16). On
11 December 29, 2011, Plaintiff filed a motion for a temporary restraining order and preliminary
12 injunction in Nevada State court. (Mot. for TRO (#1-4)). Plaintiff also recorded a notice of lis
13 pendens on the Property on January 5, 2012. (Notice of Lis Pendens (#6-13)).

14 The complaint was removed to this Court on January 20, 2012, along with all pending
15 motions. (Pet. for Removal (#1)).

16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 65 allows a court to issue a temporary restraining order
18 and preliminary injunction. “An injunction is a matter of equitable discretion” and is “an
19 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
20 entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32 (2008).
21 To obtain injunctive relief, such as a preliminary injunction or a temporary restraining order,

22
23 ³ It is unclear why California Reconveyance Company was named as a defendant in this
24 action. Plaintiff apparently confused California Reconveyance Company with Cal-Western,
25 as California Reconveyance Company is not now, nor ever has been the trustee under the
26 Deed of Trust. (Opp’n to Mot. for TRO (#6) at 3). Regardless, California Reconveyance
27 Company has responded to Plaintiff’s motion and provided the Court with the necessary
28 documentation to adjudicate this matter.

1 a plaintiff must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely
 2 to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities
 3 tips in his favor, and (4) that an injunction is in the public interest. *Id.* at 20; *Earth Island Inst.*
 4 *v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

5 **DISCUSSION**

6 **I. Likelihood of Success on the Merits**

7 Plaintiff's chief contention seems to be that Defendants did not have authority to
 8 foreclose on the Property because the proper statutory procedure was not followed. Because
 9 Plaintiff's defective foreclosure claim is at the heart of his complaint, the Court will first address
 10 whether the foreclosure was statutorily improper before turning to address the merits of
 11 Plaintiff's remaining claims.

12 **A. Defective Foreclosure**

13 Nevada law provides that a deed of trust is an instrument that may be used to "secure
 14 the performance of an obligation or the payment of any debt." NEV. REV. STAT. § 107.020.
 15 Upon default, the beneficiary, the successor in interest of the beneficiary, or the trustee may
 16 foreclose on the property through a trustee's sale to satisfy the obligation. NEV. REV. STAT. §
 17 107.080(2)(c).

18 The procedures for conducting a trustee's foreclosure sale are set forth in NRS §
 19 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the
 20 beneficiary, or the trustee must execute and record a notice of default and election to sell.
 21 NEV. REV. STAT. § 107.080(2)(c). A copy of the notice of default and election to sell must be
 22 mailed by registered mail or certified mail with return receipt requested. *Id.* § 107.080(3). The
 23 trustee or other person authorized to make the sale must wait at least three months after
 24 recording the notice of default and election to sell before the sale may proceed. *Id.* §
 25 107.080(2)(d). After the three month period, the trustee must give notice of the time and place
 26 of the sale to each trustor by personal service or by mailing the notice by registered or certified
 27 mail to the last known address of the trustor. *Id.* § 107.080(4)(a). Under NRS § 107.080(5),
 28 a "sale made pursuant to this section may be declared void by any court of competent

1 jurisdiction in the county where the sale took place if . . . [t]he trustee or other person
2 authorized to make the sale does not substantially comply with the provisions of this section.”
3 *Id.* § 107.080(5)(a).

4 A nominee on a deed of trust has the authority, as an agent, to act on behalf of the
5 holder of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide*
6 *Bank, FSB*, 2009 WL 3617650, *1 (D. Nev. 2009). As long as the note is in default and the
7 foreclosing trustee is either the original trustee or has been substituted by the holder of the
8 note or the holder’s nominee, there is no defect in the Nevada foreclosure. *Id.* at *2.

9 In this case, the proper entities foreclosed on the Property in the proper order. MERS
10 was given authority in the Deed of Trust to assign beneficial interest in the Deed of Trust to
11 others. (Deed of Trust (#6-4) at 3). As nominee, MERS also had the authority to act on behalf
12 of the holder of the note to execute a substitution of trustee. See *Gomez*, 2009 WL 3617650,
13 at *1. Pursuant to this authority, on October 28, 2008 MERS assigned all beneficial interest
14 under the Deed of Trust to U.S. Bank and substituted Cal-Western as trustee of the Deed of
15 Trust. (Substitution of Trustee (#6-7); Assignment of Deed of Trust (#6-8)). On October 30,
16 2008 Cal-Western, as trustee, executed a notice of default. (Notice of Default (#6-9)). Plaintiff
17 alleges the notice of substitution of trustee and notice of default were never recorded, but the
18 record clearly indicates this assertion is incorrect. (Substitution of Trustee (#6-7); Notice of
19 Default (#6-9)). Plaintiff failed to cure the default and accordingly Cal-Western recorded a
20 notice of trustee’s sale on February, 9, 2009; February 15, 2011; and October 17, 2011.
21 (Notice of Trustee’s Sale (##6-10, -11, -12)). Because the statutory foreclosure procedures
22 have been properly followed, no defect in the foreclosure exists.

23 Plaintiff also argues that the foreclosure was statutorily defective because his note was
24 split from the Deed of Trust. The theory that a party is not entitled to foreclose because the
25 note was split from the deed of trust has been repeatedly rejected by this Court and the Ninth
26 Circuit. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir.
27 2011); *Vega v. CTX Mortg. Co., LLC*, 761 F.Supp.2d 1095, 1097-98 (D. Nev. 2011);
28 *Khankhodjaeva v. Saxon Mortg. Servs.*, 2012 WL 214302, at *4 (D. Nev. 2012); *Parker v.*

1 *GreenPoint Mortg. Funding Inc.*, 2011 WL 5248171, at *4 (D. Nev. 2011); *Wittrig v. First Nat'l*
2 *Bank of Nevada*, 2011 WL 5598321, at **5-6 (D. Nev. 2011).

3 Accordingly, Plaintiff is unlikely to succeed on the merits of his claim for defective
4 foreclosure.

5 **B. Negligence**

6 To prevail on a negligence theory, a plaintiff must show: “(1) the defendant owed a duty
7 of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause
8 of the plaintiff's injury; and (4) the plaintiff suffered damages.” *Scialabba v. Brandise Const.*
9 *Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996). Generally, a lender owes no duty of care to a
10 borrower other than those duties defined by the Nevada foreclosure statutes. *Gomez*, 2009
11 WL 3617650, at *8.

12 Plaintiff here contends that Defendants did not exercise reasonable care in interacting
13 with clients and that they neglected to advance the mutual benefits of all parties to the Deed
14 of Trust. (Compl. (#1-2) at 8). Defendants however had no extra-contractual duty to exercise
15 reasonable care to protect borrowers or to advance their interests. See *Gomez*, 2009 WL
16 3617650, at *8. Plaintiff accordingly is unlikely to succeed on his claim of negligence.

17 **C. Wrongful Foreclosure**

18 Under Nevada law, to succeed on a claim of wrongful foreclosure a plaintiff must show
19 that a lender wrongfully exercised the power of sale and foreclosed upon his or her property
20 when the homeowner was not in default on the mortgage loan. See *Collins v. Union Federal*
21 *Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983). The Property here has not yet been sold
22 and Plaintiff has not alleged he has not defaulted on the mortgage loan, and accordingly he
23 is unlikely to be successful on this claim.

24 **D. Breach of the Covenant of Good Faith and Fair Dealing**

25 Nevada law holds that “[e]very contract imposes upon each party a duty of good faith
26 and fair dealing in its performance and its enforcement.” *A.C. Shaw Constr., Inc. v. Washoe*
27 *Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205).
28 “When one party performs a contract in a manner that is unfaithful to the purpose of the

1 contract and the justified expectations of the other party are thus denied, damages may be
 2 awarded against the party who does not act in good faith.” *Hilton Hotels v. Butch Lewis*
 3 *Prods., Inc.*, 808 P.2d 919, 923 (Nev. 1991). To succeed on a cause of action for breach of
 4 the covenant of good faith and fair dealing, a plaintiff must therefore show: (1) the plaintiff and
 5 defendant were parties to an agreement; (2) the defendant owed a duty of good faith to the
 6 plaintiff; (3) the defendant breached that duty by performing in a manner that was unfaithful
 7 to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied. *Id.*;
 8 *see also Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).

9 Plaintiff contends that Defendants breached the covenant of good faith and fair dealing
 10 by conspiring to wrongfully foreclose on him and unlawfully convert the Property. (Compl. (#1-
 11 2) at 10). Yet the Deed of Trust specifically provided for foreclosure in the event of default and
 12 the failure to cure. (See Deed of Trust (#6-4) at 3-4). Because the express terms of the Deed
 13 of Trust allow for foreclosure, Defendants did not act unfaithfully to the purpose of the Deed
 14 of Trust and any expectations Plaintiff may have had that other parties could not foreclose on
 15 the Property were not justified.

16 **E. Misrepresentation**

17 A claim of fraud requires the plaintiff to establish each of the following elements: (1) a
 18 false representation; (2) knowledge or belief that the representation was false (or knowledge
 19 that the defendant’s basis for making the representation was insufficient); (3) intent to induce
 20 the plaintiff to consent to the contract’s formation; (4) justifiable reliance upon the
 21 misrepresentation; and (5) damage resulting from such reliance. *J.A. Jones Const. Co. v.*
 22 *Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004). Pursuant to Fed. R. Civ. P.
 23 9(b), a party alleging fraud “must state with particularity the circumstances constituting fraud
 24 or mistake.” To satisfy this standard, a plaintiff must plead “an account of the ‘time, place, and
 25 specific content of the false representations as well as the identities of the parties to the
 26 misrepresentations.’ ” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting
 27 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)).

28 Plaintiff alleges Defendants engaged in fraud by “feign[ing] consideration of modification

1 options, only to ultimately expedite foreclosure,” by making false representations in public
2 notices and records, and by pretending to record documents pursuant to NRS § 107.080.
3 (Compl. (#1-2) at 12-14). Plaintiff has however failed to plead with particularity by stating the
4 content of the false representations, the identity of the party who made the representations,
5 and the time and place of the representations. Furthermore, the record contradicts Plaintiff’s
6 claim that Defendants only pretended to record documents pursuant to NRS § 107.080, as
7 Defendants have presented copies of the those documents which indicate that they were in
8 fact recorded. (See, e.g., Substitution of Trustee (#6-7); Assignment of Deed of Trust (#6-8);
9 Notice of Default (#6-9); Notice of Trustee’s Sale (##6-10, -11, -12)). Plaintiff accordingly is
10 unlikely to succeed on this claim.

11 **F. Detrimental Reliance**

12 Plaintiff’s claim of detrimental reliance is vague and seems to overlap with a number
13 of his other claims. Plaintiff essentially asserts that he relied on the belief that Defendants
14 would follow the statutorily prescribed protocols in foreclosing and that Defendants failed to
15 follow these protocols by not mailing to him the notice of default. (Compl. (#1-2) at 14).

16 Although this allegation would have been more appropriately brought under Plaintiff’s
17 claim for defective foreclosure, it is true that under NRS § 107.080(3) a copy of the notice of
18 default and election to sell must be mailed to the borrower by registered mail or certified mail
19 with return receipt requested. All that is required is that the foreclosing party mail the notice
20 of default to the plaintiff; the foreclosing party has no duty to ensure that the notice of default
21 was actually received. *Corn v. Recontrust Co., N.A.*, 2011 WL 1135943, at *5 (D. Nev. 2011);
22 see also *Hankins v. Adm’r of Veterans Affairs*, 555 P.2d 483, 484 (Nev. 1976) (mailing of the
23 notices is all that the statute requires and their mailing presumes that they were received). A
24 defendant may prove the notice of default was actually mailed by affidavits and certificates of
25 posting. *Corn*, 2011 WL 1135943, at *5.

26 Defendants here have shown the notice of default was properly executed and recorded.
27 (Notice of Default (#6-9)). Although it is not clear that the notice of default was actually mailed
28 to Plaintiff, because Defendants properly executed and recorded the notice of default it seems

1 more than likely that the mailing occurred. Furthermore, Plaintiff has made numerous other
 2 allegations in the complaint regarding the circumstances surrounding this case and
 3 Defendants' compliance with NRS § 107.080 that have proven to be untrue, which weighs
 4 against Plaintiff in the Court's evaluation of the likelihood that Plaintiff will ultimately be able
 5 to prove this claim and succeed on the merits.⁴

6 **G. Fair Debt Collection Practices Act**

7 For a defendant to be liable for a violation of the Fair Debt Collection Practices Act
 8 ("FDCPA"), the defendant must be classified as a "debt collector" within the meaning of the
 9 Act. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, 2010
 10 WL 4102943, at *3 (D. Nev. 2010). A "debt collector" is defined by the FDCPA as a person
 11 "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or
 12 asserted to be owed or due another." 15 U.S.C. § 1692a(6). Foreclosure pursuant to a deed
 13 of trust does not constitute debt collection under the FDCPA. *Camacho-Villa v. Great W.*
 14 *Home Loans*, 2011 WL 1103681, at *4 (D. Nev. 2011). Additionally, "the FDCPA's definition
 15 of 'debt collector' does not 'include the consumer's creditors, a mortgage servicing company,
 16 or any assignee of the debt, so long as the debt was not in default at the time it was assigned.'
 17 " *Id.* (quoting *Croce v. Trinity Mortg. Assurance Corp.*, 2009 WL 3172119, at *2 (D. Nev.
 18 2009)). As Defendants here are foreclosing on the Property pursuant to a deed of trust, they
 19 do not qualify as "debt collectors" within the meaning of the FDCPA, and consequently Plaintiff

21 ⁴ For example, Plaintiff has alleged that the notice of default was filed before Cal-
 22 Western was formally substituted as trustee, that the substitution of trustee and notice of
 23 default were never recorded, and that other documents were never recorded in violation of
 24 NRS § 107.080. (Compl. (#1-2) at 11, 13). Yet these allegations are all clearly refuted by the
 25 documents presented by Defendants. (See, e.g., Substitution of Trustee (#6-7); Notice of
 26 Default (#6-9); Notice of Trustee's Sale (##6-10, -11, -12)). As noted earlier, Plaintiff has also
 27 misstated the date the Property was purchased and the date the Deed of Trust executed.
 28 (See *supra* note 2).

1 is unlikely to succeed on this claim.

2 **H. Injunctive and Declaratory Relief**

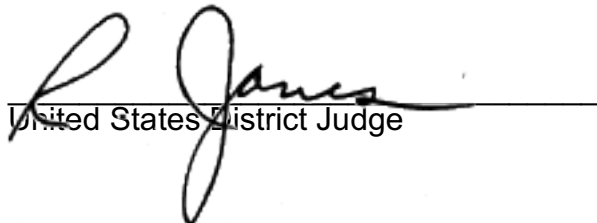
3 Injunctive and declaratory relief are not separate causes of action, but are dependent
4 on the merits of the plaintiff's substantive claims. See *Stock West, Inc. v. Confederated Tribes*
5 *of the Coville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989); *In re Wal-Mart Wage & Hour*
6 *Employ. Practices Litig.*, 490 F.Supp.2d 1091, 1130 (D. Nev. 2007). As Plaintiff is unlikely to
7 succeed on any of his substantive claims for relief, he is also unlikely to succeed on these
8 dependent claims.

9 Additionally, as noted above, to succeed on a claim for injunctive relief, the plaintiff
10 must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm
11 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
12 injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20
13 (2008). Plaintiff has failed to establish that he is likely to succeed on the merits of his claims,
14 and therefore he is not entitled to injunctive relief and there is no need for the Court to look at
15 the remaining factors. See *Global Horizons, Inc. v. U.S. Dept. of Labor*, 510 F.3d 1054, 1057-
16 58 (9th Cir. 2007) ("Once a court determines a complete lack of probability of success or
17 serious questions going to the merits, its analysis may end, and no further findings are
18 necessary.").

19 **CONCLUSION**

20 For the foregoing reasons, IT IS ORDERED that Plaintiff's motion for a temporary
21 restraining order and preliminary injunction (#1-4) is denied.

22
23 DATED: This _9th_ day of February, 2012.

24
25 
26 United States District Judge
27
28